



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 17, 2003

Mr. Christopher B. Richardson
Strawn & Richardson, P.C.
602 Sawyer, Suite 205
Houston, Texas 77007-7510

OR2003-6514

Dear Mr. Richardson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187786.

The Galveston County Water Control and Improvement District No. 12 (the "district"), which you represent, received a request for the following information:

1. All files and documents relating to any annexation conducted or considered by the District since January 1, 1990.
2. Any documents upon which [the district] estimate[s] that title reports for the proposed annexation of the west half of Kemah Oaks and South Kemah will cost \$40,000.
3. All legal bills to the District from Strawn & Richardson since January 1, 1995.
4. Any correspondence between the District and Strawn & Richardson regarding the City of Kemah or any annexation proposed by the District.
5. Any document relating to the reimbursement by the District of any expense to any Board Member since January 1, 1995.
6. The annual budget for the District for all fiscal years ending since 1995.

7. The annual audit of the District performed by outside auditors for all fiscal years ending since 1995.

8. All rate studies conducted by the District since January 1, 1995.

9. Any rate study ever conducted by the District to justify the rate charged to the City of Kemah.

10. All Board agendas and minutes of meeting since January 1, 1995.

11. Any resumes or other documents reviewed or consider[ed] by Board in appointing [two named individuals] to the Board.

12. All campaign finance reports filed by any candidate for the Board since January 1, 1995.

You state that some responsive information has been made available to the requestor.¹ You claim that information responsive to categories 3 and 4 of the request is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

We begin by noting that some of the submitted documents are not responsive to the instant request for information. We have marked these documents, which the district need not release in response to this request, and this ruling will not address that information.

We next note that some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part as follows:

¹We note that the administrative inconvenience of providing public records to a requestor in response to an open records request does not constitute sufficient grounds for denying such a request. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

²Although you argue that information is protected under the attorney-client privilege pursuant to section 552.101 of the Government Code, which excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," the attorney-client privilege is recognized under section 552.107. *See Open Records Decision No. 574* (1990). Thus, we address your attorney-client privilege argument under section 552.107.

³We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499* (1988), *497* (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Under section 552.022, attorney fee bills must be released unless they are expressly confidential under other law. Section 552.107 of the Government Code is a discretionary exception under the Public Information Act (the "Act") and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 676 at 6 (2002) (section 552.107(1) is exception to disclosure under the Act and not "other law" that makes information expressly confidential), 630 at 4 (1994) (governmental body may waive section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general). Therefore, you may not withhold any portion of the submitted fee bills under section 552.107 of the Government Code. However, the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). This office has determined that when the attorney-client privilege is claimed for information that is subject to release under section 552.022, the proper analysis is whether the information at issue is excepted under Texas Rule of Evidence 503. Open Records Decision No. 676 at 6 ("appropriate law for a claim of attorney-client privilege for section 552.022 information is Texas Rule of Evidence 503"). Thus, we will consider whether the information that is subject to section 552.022 is excepted under rule 503.

Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a

representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See* Tex. R. Evid. 503(a)(5).

Thus, to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676. Upon a demonstration of all three factors, the privileged information is confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ); *see also* Open Records Decision No. 676.

We note that you have failed to identify some of the parties to the communications in the submitted attorney billing statements. *See* Open Records Decision No. 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503). Nevertheless, in certain instances, we are able to ascertain the identities of the parties involved. Thus, we have marked those portions of the billing statements that reflect confidential communications made for the purpose of facilitating the rendition of professional legal services to the client pursuant to rule 503. We find, however, that you have not demonstrated the applicability of rule 503 for the remaining information in the submitted billing statements. *See generally* Open Records Decision No. 150 (1977) (stating that predecessor to Act places burden on governmental body to establish why and how exception applies to requested information); *see also Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it). Accordingly, you must release the remainder of the information subject to section 552.022 to the requestor.

We now address your claim under section 552.107 for the submitted information that is not subject to section 552.022. *See* Open Records Decision No. 676 at 4. This is because such information is not excepted from disclosure except to the extent that one or more exceptions under the Act applies to it"). When asserting the attorney-client privilege under section 552.107, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *Id.* at 6-7. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney is acting in capacity other than that of attorney).

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Based upon your representations and our review of the information at issue, we find that portions of this information are privileged attorney-client communications. Therefore, the information that we have marked may be withheld under section 552.107.

Finally, we note that some of the information otherwise marked for release contains e-mail addresses of members of the public. Section 552.137 of the Government Code provides:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating

electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., H.B. 2032, § 1 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. Based on our review of the submitted information, we find that the e-mail addresses that we have marked are excepted from disclosure under section 552.137(a). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Accordingly, unless consent to release has been granted, the district

must withhold the e-mail addresses that we have marked pursuant to section 552.137(a) of the Government Code.

In summary, the district may withhold the information we have marked pursuant to Rule of Evidence 503 and section 552.107. The marked e-mail addresses must be withheld under section 552.137 unless consent to release has been granted. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 187786

Enc. Submitted documents

c: Mr. William E. King
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(w/o enclosures)